

MALAYSIAN REPORTS

Arab Malaysian Merchant Bank Bhd v Jamaludin bin Dato Mohd Jarjis

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL
NO 03-37-90
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF
AND GUNN CHIT TUAN SCJJ
4 MARCH 1991

Civil Procedure — Joinder of parties — Application to be added as party — Scope of — Rules of the High Court 1980, O 15 r 6

The appellant had obtained judgment in default of appearance against certain judgment debtors and the respondent had undertaken to settle the judgment debt by monthly instalments in consideration of the appellant refraining at his request from enforcing the judgment debt against the judgment debtors. Subsequently the respondent was unable to keep up with the instalment and he applied to set aside the said judgment in default against the judgment debtors on the ground that it was irregular as the interest ordered to be paid in the judgment far exceeded that allowed under O 42 r 12 of the Rules of the High Court 1980. In order to have the judgment in default set aside the respondent applied to the court for leave to be made a party to the said suit. His application was allowed by the senior assistant registrar and an appeal to the High Court was dismissed. The appellants appealed to the Supreme Court.

Held, dismissing the appeal:

The respondent, who had undertaken to pay the debt of the judgment debtors, would not only be affected in his legal rights but also in his pocket in that he would be bound to foot a larger bill if the judgment in default which includes excessive interest is not set aside. Both the senior assistant registrar and the learned judge were therefore right in exercising their discretion to allow the respondent to intervene in the suit between the appellant and the judgment debtors.

[Bahasa Malaysia summary]

Perayu telah mendapat penghakiman ingkar terhadap beberapa penghutang penghakiman dan responden telah bersetuju hendak menyelesaikan hutang penghakiman itu dengan bayaran ansuran bulanan atas balasan perayu bersetuju tidak menguatkuasakan hutang penghakiman itu terhadap penghutang penghakiman. Kemudiannya responden tidak dapat meneruskan bayaran ansuran itu dan ia menohon supaya penghakiman ingkar terhadap penghutang penghakiman itu diketepikan atas alasan ia adalah luar aturan oleh kerana bunga yang diperintah dibayar di dalam penghakiman itu adalah lebih tinggi daripada yang dibenarkan di bawah A 42 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980. Supaya beliau boleh mendapat penghakiman ingkar itu diketepikan, responden menohon kepada mahkamah mendapat kebenaran ia dijadikan pihak di dalam kes itu. Permohonannya telah dibenarkan oleh penolong kanan pendaftar dan rayuan kepada Mahkamah Tinggi telah ditolak. Perayu terus merayu ke Mahkamah Agung.

Diputuskan, menolak rayuan itu:

Responden yang telah mengaku hendak membayar hutang penghutang penghakiman itu, akan terjejas bukan sahaja dari segi haknya di sisi undang-undang akan tetapi juga dari koceknya oleh kerana ia terpaksa membayar lebih banyak jika

A penghakiman ingkar itu yang mengandungi bunga melampau tidak diketepikan. Penolong kanan pendaftar dan yang arif hakim adalah betul dalam menjalankan budibicara mereka membenarkan responden mencelah di dalam perkara ini antara perayu dan penghutang penghakiman.]

Cases referred to

- 1 *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 (distd)
2 *Gurtner v Circuit* [1968] 1 All ER 328 (folld)

Legislation referred to

Rules of the High Court 1980 O 15 r 6

Appeal from: Civil Suit No C 2870-84 (High Court, Kuala Lumpur)

C *DP Naban (Shakila Azariah (Ms) with him) for the appellant.*

Liza Chan (Ms) for the respondent.

Cur Adr Vult

D **Gunn Chit Tuan SCJ** (delivering the judgment of the court): We dismissed this appeal with costs and ordered that the deposit be paid to one Dr Jamaludin bin Dato Mohd Jarjis ('the respondent') to account of his taxed costs and now give the reasons for our decision.

This issue in this case was whether the respondent should be allowed to intervene in Civil Suit No C 2870-84 between Arab Malaysian Merchant Bank Bhd ('the appellant') and Azam Murni Sdn Bhd and one Mohamed Mazlan bin Idris ('the judgment debtor'). The appellant had on 18 February 1985 obtained judgment in default of appearance against the judgment debtors in the said civil suit for a sum of \$82,475.70 together with interests at 0.5% per day calculated from 1 April 1984, to date of realization and \$225 costs. When a demand was made on the judgment debtors, the respondent undertook to settle the judgment debt by monthly instalments of \$3,000 each in consideration of the appellant refraining at his request from enforcing the judgment against the judgment debtors. A letter of undertaking dated 10 December 1986, was executed by the respondent before an advocate and solicitor. (See p 33 of the appeal record.) The respondent kept up with his instalment payments until the middle of 1988 when he was unable to do so due to financial difficulties, and on 28 June 1989, he applied to set aside the said judgment in default against the judgment debtors on the ground that it was irregular as the interest ordered to be paid in the judgment far exceeded that allowed under O 42 r 12 of the Rules of the High Court 1980.

I In order to have the judgment in default set aside, the respondent applied to the court for leave to be made a party to the said suit and was allowed to intervene and be made a party in the action by the senior assistant registrar of the High Court on 13 September 1989. The appellant appealed to the judge-in-chambers on 16

September 1989, and its appeal was dismissed by the learned judge on 20 February 1990.

On appeal before us, Mr DP Naban, leading counsel for the appellant, pointed out that the principal debtors have not applied to set aside the judgment in default which, at the relevant time, that is 18 February 1985, allowed interest to be at the contractual rate and not that as laid down in O 42 r 12. Counsel contended that the respondent should have applied to set aside the agreement in his said letter of undertaking on which the appellant had instituted an action against him in Kuala Lumpur Sessions Court Summons No 62-3975-1988 for breach of the said undertaking. Mr Naban then referred to the following test laid down by the Privy Council in *Pegang Mining Co Ltd v Choong Sam & Ors*¹ at p 56 for the court to decide whether a person is entitled to be added as a party:

A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

and contended that the learned judge had applied the wrong test in this case.

It was held by the Privy Council in the *Pegang Mining Co Ltd* case¹ that one of the principal objects of O 16 r 11 of the former Rules of the Supreme Court 1957, is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. It must be noted that the Privy Council in that case added that to achieve that object calls for a flexibility of approach which made it undesirable in that case, in which the facts are unique, to attempt to lay down any proposition which could be applicable to all cases. Our present O 15 r 6 of the Rules of the High Court 1980, which replaced the former O 16 r 11 of the Rules of the Supreme Court 1957, is in pari materia with O 15 r 6 of the UK Rules of the Supreme Court. The scope of the present rule, so far as concerns the joinder of persons not parties, has been significantly extended by the addition of para 2(b)(ii) which is as follows:

(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application —

(a) ...

(b) order any of the following persons to be added as party namely

...

(ii) any person between whom and any part to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief of remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;

A One of the class of cases covered by the said rule, which allows intervention by persons not parties, is where the proprietary or pecuniary rights of the intervener are directly affected by the proceedings or where the intervener may be rendered liable to satisfy any judgment either directly or indirectly. The ambit of this class has been materially widened by the decision of the UK Court of Appeal in *Gurtner v Circuit*,² the effect of which is to include any case in which the intervener is directly affected not only in his legal rights but in his pocket. In this connection, we would refer to and respectfully adopt the following dictum of Lord Denning MR, in that case, in which his Lordship said as follows:

C It seems to me that, when two parties are in dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute to be effectually and completely, determined and adjudicated upon between all those directly concerned in the outcome.

In our present case, we considered that the respondent, who had undertaken to pay the debt of the judgment debtors, would not only be affected in his legal rights but also in his pocket in that he would be bound to foot a larger bill if the judgment in default, which includes excessive interest, is not set aside. Both the learned judge and the senior assistant registrar were therefore right in exercising their discretion to allow the respondent to intervene in the said suit between the appellant and the judgment debtors, and the learned judge had correctly dismissed the appellant's appeal to him. That was the reason why we confirmed the High Court's decision and also dismissed this appeal to us with costs.

Appeal dismissed.

G Solicitors: Syed Alwi Ng & Teoh; Liza Chan & Co.

Reported by Prof Ahmad Ibrahim

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